Supreme Court, U.S.
FILED
OCT 1 - 2003
OFFICE OF THE CLERK

No. 03-280

In the
Supreme Court of the United States

WIM DELVOYE, in the Matter of Sebastian Delvoye,
an infant under the age of one,

Petitioner,

v.

CHRISTINA LEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

DEAN G. YUZEK
Counsel of Record
INGRAM YUZEK GAINEN CARROLL
& BERTOLOTTI, LLP
250 Park Avenue
New York, New York 10020
(212) 907-9600

Counsel for Petitioner Wim Delvoye

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
THIS COURT SHOULD GRANT MR. DELVOYE'S PETITION FOR A WRIT OF CERTIORARI	1
CONCLUSION	7

TABLE OF AUTHORITIES

Page(s)

Cases:

Re Bates, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989) 5

Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999)..... 3

England v. England, 234 F.3d 268 (5th Cir. 2000)..... 3

Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995)..... 4

Friedrich v. Friedrich ("Friedrich I"), 983 F.2d 1396 (6th Cir. 1993)..... 4

Friedrich v. Friedrich ("Friedrich II"), 78 F.3d 1060 (6th Cir. 1996)..... 6

Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001)..... 5

Miscellaneous:

Hague Convention on the Civil Aspects of International Child Abduction, *done* October 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (1986)..... *passim*

PETITIONER WIM DELVOYE'S REPLY IN FURTHER SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI

Petitioner, Wim Delvoye ("Mr. Delvoye"), respectfully submits this reply in further support of his petition to this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit dated May 20, 2003 (Appendix to Petition ["A"]-1-A-7).

THIS COURT SHOULD GRANT MR. DELVOYE'S PETITION FOR A WRIT OF CERTIORARI

The sole purpose of the underlying proceeding brought pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction* (the "Hague Convention" or the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,494 (1986), is to determine whether Mr. Delvoye's country of citizenship (Belgium) or that of Respondent Christina Lee ("Ms. Lee") (the United States) will hear and determine custody and support issues for their child Sebastian Delvoye ("Sebastian" or the "Child"). Under the Convention, such determinations are based on whether the Child was wrongfully removed from or wrongfully retained outside of the Child's country of habitual residence. Hague Convention, Art. 4. It is undisputed that the Belgian courts are equally capable of adjudicating custody and support issues as are the courts of the United States or any of its individual states.

Distilled to its essence, the courts below were confronted with a mother, Ms. Lee, a United States citizen, and a father, Mr. Delvoye, a Belgian national, both of whom, indisputably, resided, before Appellee became pregnant, in their respective countries. Ms. Lee went to Belgium with Mr. Delvoye in November 2000 in the early stages of her pregnancy and began living with him there; their Child was born in Belgium on

May 14, 2001 and their Child lived exclusively in Belgium with his parents until Ms. Lee unilaterally removed him from Belgium and took him to the United States on July 23, 2001 because she no longer wished to remain with Mr. Delvoye in Belgium. Ms. Lee's actions violated Mr. Delvoye's joint rights of custody in the Child in abrogation of Belgian law and, it is submitted, violated the Hague Convention, to which both the United States and Belgium are signatory countries.

Ms. Lee's Brief in Opposition is replete with allegations, presented as facts, which are irrelevant on this petition but which also are not supported by the record below. While Mr. Delvoye recognizes that this Court does not review factual disputes, Mr. Delvoye believes that it is important for the Court to understand that the purported facts contained in Ms. Lee's Brief in Opposition are baseless.[1]

Putting aside her recriminations and hyperbole, Ms. Lee asserts that the District Court and the Third Circuit correctly determined that Belgium was not the Child's habitual

---

[1] For example, Ms. Lee was not "entrapped" in Belgium or "terrorized" by Mr. Delvoye (*see* Ms. Lee's Brief in Opposition at 6-7). Indeed, during this period of alleged entrapment and terror, for which there is no record support, Ms. Lee was visited by her mother for three weeks, including two weeks *after* Sebastian's birth, and by her attorney-sister, Susan Lee, for a portion of that period. Yet, during their stay in Belgium with her, Ms. Lee did not seek their help to return with Sebastian to the United States. One would expect someone already supposedly entrapped and terrified to ask these two most-logical people — a mother and a sibling whose profession is to address difficult issues — for such help if, in fact, it were really needed. But she readily admits she did not. In any event, by Ms. Lee's own admissions, she was — at a minimum — living in Belgium, in a place which *she,* in a sworn affidavit in these proceedings, referred to as "home," without a clear or definite plan regarding where she, Mr. Delvoye and the Child might ultimately reside. When the relationship deteriorated to the point that she felt compelled to separate, it was therefore incumbent on her to avail herself of the well-equipped legal system in Belgium, where she was living and had given birth and where Sebastian had only ever lived.

residence: (1) because the neonate Child, as a matter of law, could not have been in Belgium for a sufficient amount of time to have "acclimatized" to Belgium;[2] and (2) because, looking at the "settled intent" of the parents, Ms. Lee never considered her stay in Belgium to be permanent and her "settled intent" was to have the Child in Belgium and thereafter return to her "New York home base" after which she and Mr. Delvoye would determine which European city would become their European home base (Brief in Opposition at 4).

Ms. Lee, in an effort to support the Third Circuit's decision, attempts to mold the "settled intent" cases to fit this case. The "settled intent" cases, however, do not apply here for two reasons. First, the Hague Convention concept of "settled intent" applies where a family has relocated from one country to another and the court has to choose which of the two — or more — countries in which the child has lived is the child's habitual residence. In that situation, the court analyzes the settled intent of the parents to determine whether the parents intended to abandon the prior habitual residence. "Settled intent" does not apply here where the Child was born and resided exclusively in one country prior to the wrongful removal (*see* Petition at 9-10).

---

[2] The District Court opined that a neonate cannot have been present anywhere long enough to have an acclimatization apart from his parents. Acclimatization is the attachment that a mature child may develop in a new country *after* a wrongful removal. Article 13 of the Hague Convention excuses the duty to return a child to its country of habitual residence if the preponderance of the evidence demonstrates that a child who "has attained an age and degree of maturity at which it is appropriate to take account of its views" has become so acclimatized to its new environment that the child objects to repatriation. *See, e.g., Blondin v. Dubois,* 238 F.3d 153, 166 (2d Cir. 2001); *England v. England,* 234 F.3d 268, 272 (5th Cir. 2000). Obviously, acclimatization has no bearing on cases involving children of tender years and is not relevant to a determination of habitual residence here.

Second, Ms. Lee focuses on *her own* future intentions as to where she and the Child would settle — future intentions that were not shared by Mr. Delvoye. Regardless of the inapplicability of the "settled intent" analysis to this "one-country" case, Ms. Lee's singular future intentions clearly are not reflective of the parties' "settled *future* intent" — a fact clearly recognized by the Third Circuit when it stated in its decision:

> Because petitioner and respondent lacked the "shared intentions regarding their child's presence [in Belgium]," *Feder*, 63 F.3d at 224, Baby S did not become an habitual resident there. Even if petitioner intended that he become an habitual resident, respondent evidenced no such intention.

Appendix to Petition at A-8.

It is here, we respectfully submit, that the Third Circuit erred. Future intentions — Ms. Lee's or otherwise — are irrelevant to the court's inquiry as to the Child's habitual residence. *Friedrich v. Friedrich ("Friedrich I")*, 983 F.2d 1396, 1401-02 (6th Cir. 1993) (quoted with approval in *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995)); *see also* Petition at 13-14. If future intentions were not irrelevant to the inquiry, then, in the case of a "one country" neonate child, such as the Child at issue here, when parents do not agree on where they intend in the future to live with the child, as the Third Circuit opined, "no habitual residence may ever come into existence" (Appendix to Petition at A-7). And, as a result, the child would not be afforded the protections of the Hague Convention.[3] This, we submit, is not the intention of the Hague Convention.

---

[3] Ms. Lee also suggests that her habitual residence in the United States could be Sebastian's habitual residence. *See* Brief in Opposition at 1 ("There is no wrongful removal to the United States if (a) the parent consents to the child's removal, . . . or, (b) the Court finds the habitual residence of the child is the United States") and at 13 ("Indeed, as the

In its decision, the Third Circuit quoted from *Re Bates*, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989), as follows:

> There must be a degree of settled purpose. . . . All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

(Appendix to Petition at A-8.) To the extent that the "degree of settled purpose" referred to in *Re Bates* and the Third Circuit's decision (Appendix at A-8) may be read to be different from the "settled intent" doctrine embodied in cases such as, *e.g.*, *Mozes* or *Tsarbopoulos*, we submit that Sebastian's life had a degree of settled purpose because Belgium is where Sebastian was born and Belgium is where Sebastian lived with his parents until he unilaterally was removed from Belgium and brought to the United States by Ms. Lee.

The Hague Convention establishes a framework for determining which country shall hear and determine custody and support issues where a child has been wrongfully removed from or is being wrongfully retained in a member country. Ms. Lee voluntarily went to Belgium and availed herself of

---

Mozes Court stated, 'in the absence of settled parental intent, courts should be slow to infer from such contacts that an *earlier* habitual residence has been abandoned' " (emphasis added)). *Mozes* is a settled intent case where the court chose between two countries in which the child had resided *prior to* the wrongful removal to determine habitual residence. This Child, however, is a "one-country" child who had only lived in Belgium prior to the removal. A child simply cannot be a habitual resident of a country in which the child has never lived. *Mozes v. Mozes*, 239 F.3d 10607, 1082 (9th Cir. 2001) ("[W]hatever the parents' intent, habitual residence cannot be acquired without physical presence"). Furthermore, as the Third Circuit recognized, "[t]o say that the child's habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create and impermissible presumption that the child's habitual residence is where the mother happens to be." (Appendix to Petition at A-7.)

the Belgian medical system for her pre-natal care and the birth of their Child. Having done so, and having given birth to Sebastian in Belgium, she and the Child became subject to Belgium law, including with respect to issues of custody. Under Belgian law, Mr. Delvoye had joint custody of the Child from his birth. When the relationship deteriorated and Ms. Lee no longer wanted to remain with Mr. Delvoye, Ms. Lee was bound to avail herself of the Belgian legal system to determine custody and support issues.

It is undisputed that the Belgian courts are well-equipped to address issues of custody and support. The treaty between the United States and Belgium manifested in the Hague Convention should have precluded the courts from rewarding Ms. Lee's decision to use self-help in (i) abrogating Mr. Delvoye's joint custodial rights and (ii) selecting the forum in which issues of custody and support are to be resolved.

To create, as did the Third Circuit, an exception to habitual residence where none was intended by the Convention, is antithetical to the Convention itself, rewards an abducting parent, encourages others to take similar actions in contravention of the mandate of the Hague Convention, and suggests that the courts of the United States — the country to which the child has been removed — do not consider the courts of Belgium — the country from which the child was removed — capable of determining issues of custody and support. *See, e.g., Friedrich v. Friedrich ("Friedrich II")*, 78 F.3d 1060, 1068 (6th Cir. 1996) ("In thinking about these problems, we acknowledge that courts in the abducted-from country are as ready and able as we are to protect children. . . . When we trust the court system in the abducted-from country, the vast majority of claims of harm — those that do not rise to the level of gravity required by the Convention — evaporate").

The Third Circuit's decision is fundamentally flawed and should not be allowed to stand.

CONCLUSION

For these reasons, as well as the reasons expressed in the Petition, this Court should grant petitioner Wim Delvoye's Petition for a Writ of Certiorari and reverse the decision of the Third Circuit Court of Appeals.

Dated: September 30, 2003

Respectfully submitted,

DEAN G. YUZEK
Counsel of Record
INGRAM YUZEK GAINEN CARROLL
& BERTOLOTTI, LLP
250 Park Avenue
New York, New York 10020
(212) 907-9600

Counsel for Petitioner Wim Delvoye